91-581

Supreme Court, U.S.
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CASE NO. A-159

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

Monica Greene, Individually and as Personal Representative of the Estate of Sylvia S. Greene,

Petitioner,

v.

David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C. S. Waterman and DOES 1-100, Inclusive,

Respondent.

Petition for Writ of Certiorari to the

United States Court of Appeals for the

Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Plaintiff Greene's having initially served "The United States" with her complaint (which described the governmental defendant as "David Grant United States Air Force Medical Center") should be considered a mere misnomer, therefore her amendment correcting that description was not actually "changing the party" and should have been allowed.

II. Whether this Court should review its *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379 (1986) opinion, in light of subsequent criticism and injustices, to construe Federal Rules of Civil Procedure Rule 15(c)'s phrase: "within the period provided by law for commencing the action" to include the time allowed under Rule 4(j) for service of process.

III. Whether the courts below should have permitted amendment under Rule 60(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

ARGUMENT 5

I. Plaintiff Greene initially served the United States with a summons describing the intended defendant as "United States Government", therefore her complaint's caption describing the governmental defendant as "David Grant United States Air Force Medical Center" should be considered a mere misnomer; since her subsequent amendment correcting that misdescription was not "changing the party," FRCP Rule 15(c)'s requirement of notice prior to expiration of the time for "commencing the action" does not apply, so her amendment of the misdescription should have been allowed and this Petition for Writ of Certiorari should be granted 5

A. The United States Court of Appeals for the Ninth Circuit has decided a question that conflicts with applicable decisions of this Court. 5

B. The Ninth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other United States Courts of Appeals 8

II. In light of subsequent criticism and injustices which Rule 15(c) was designed to avoid, this Court should review its *Schiavone v. Fortune* opinion to construe Federal Rule of Civil Procedure 15(c)'s phrase, "within the period provided by law for commencing the action," to include the time allowed under Rule 4(j) for service of process. 10

A. Widespread scholarly criticism calls for modification of *Schiavone* 10

B. The Advisory Committee on Civil Rules has already proposed amendments and held hearings on adopting amendments to incorporate Rule 4's period for service into Rule 15(c), which the Supreme Court has reviewed and approved 12

III. Plaintiff should have been granted relief under Rule 60(b) in that any alleged errors were the result of reasonable mistake, inadvertence or excusable neglect. 13

IV. Conclusion 14

APPENDIX

Exhibits

Exhibit A, Proof of Service 1
Exhibit B, Summons 2

Orders

USDC Order dated Mar. 16, 1990 4
USDC Judgment In A Civil Case 6
USDC Order dated Apr. 20, 1990 7
USDC Judgment In A Civil Case 9
USDC Order dated June 1, 1990 10
Ninth Cir. Court of Appeals Order 5/31/91 12
Ninth Cir. Court of Appeals Order 6/11/90 . 13
Ninth Cir. Court of Appeals Memo 14
US Supreme Court dated Aug. 3, 1991 19

Statutes

FRCP 1. Scope of Rules 20
FRCP 4. Process 20
FRCP 8. General Rules of Pleading . . . 25
FRCP 15(c). Amended and Supplemental Pleadings 27
FRCP 60(b). Relief From Judgment or Order 30
Local Rule, USDC, Central, California. 30

TABLE OF AUTHORITIES

CASES

A. F. Dormeyer Co. v. M.J. Sales & Dist., Co.,
461 F.2d 40 (CA 7th, 1972) 14

Bell v. Veterans Administration Hospital,
654 F.Supp. 69 (W.D. La. 1987) 10

Brittian v. Velk Gallant Company,
301 F.Supp. 478 (D.C. Ga. 1969) 6

Conley v. Gibson,
355 U.S. 41, 48, 78 S.Ct.
99, 103 (1957) 12

Dandrea v. Malsbary Mfg. Co.,
839 F.2d 163 (3rd Cir. 1988) 8, 9

Datskow v. Teledyne, Inc. Continental Products Division,
899 F.2d 1298 (2nd Cir. 1990) 8

Drayton v. Veterans Administration,
654 F.Supp. 558 (S.D. N.Y. 1987) 10

Foman v. Davis,
371 U.S. 178, 181-182,
83 S.Ct. 227, 230 (1962) 12

Gillespie v. Civiletti
(9th Cir. 1980) 629 F.2d 637 14

Hibernia Nat. Bank v. Administracion Cent. Soc. Anonima,
776 F.2d 1277 (5th Cir. 1985) 14

Johnson v. United States Postal Service,
113 F.R.D. 73 (D. Colo. 1986) 10

Norton v. International Harvester Co.,
627 F.2d 18 (7th Cir. 1980) 11

Peterson v. Sealed Air Corporation,
902 F.2d 1232 (7th Cir. 1990) 9, 10

Potter v. McCall,
(9th Cir. 1970) 433 F.2d 1087, 1088) 14

Sandridge v. Folsom,
200 F.Supp. 25 (M.D. Tenn. 1959) 11

Schiavone vs. Fortune,
477 U.S. 21, 106 S.Ct. 2379 (1986) 5, 8-15

Stewart v. United States Postal Service,
649 F.Supp. 1531 (S.D. N.Y. 1986) 10

STATUTES

FRCP Rule 1 11

FRCP Rule 4 . . . . . 3, 11, 12

FRCP Rule 4(j) 10

FRCP Rule 8 . . . . . 11, 13

FRCP Rule 15(c) 5-13

FRCP Rule 60(b) 13-15

MISCELLANEOUS

127 F.R.D. 237, 310 12

Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,*
63 Notre Dame L.Rev. 720 (1988)
at 722, 726-732 11

Byse, *Suing the "Wrong" Defendant In Judicial Review of Federal Administration Actions: Proposals for Reform*, 77 Harv.L.Rev. 40 (1963) 10

Epter, *An Un-Fortune-ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 Fla.S.Uni. L.Rev. 715 (1990) at 717, 730-36, 744-47 11

Helzick, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.Uni.L.Rev. 131 (1988) at 132-34, 148-53 11

West, *Federal Civrvil Judicial Procedure and Rules As Amended to July 1991*, (1991 Rev. Ed.) pp. 46-49 12

Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* (1990) Section 1498, pp. 130-134 7

STATEMENT OF THE GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

(i) On April 23, 1991, the United States Court of Appeals for the Ninth Circuit entered the judgment sought to be reviewed.

(ii) On May 31, 1991, the United States Court of Appeals for the Ninth Circuit denied Plaintiff-Appellant Greene's Petition for a rehearing. On September 3, 1991, this Court granted an extension of time within which to file the Petition for a Writ of Certiorari until September 28, 1991.

(iii) This Petitioner is not relying upon Rule 12.3.

(iv) 28 U.S.C. Section 1254 confers upon this Court jurisdiction to review the April 23, 1991 judgment by the Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

The following statutes are involved in this case:

1. Federal Rule of Civil Procedure 15, the proposed amendments to Rule 15 and the Advisory Committee Notes;

2. Federal Rule of Civil Procedure 4(j);

3. Federal Rule of Civil Procedure 60(b);

4. Federal Rule of Civil Procedure 1;

5. Federal Rule of Civil Procedure 8(f);

6. Local Rule 3.7.2.2of the United States District Court for the Central District of California.

The foregoing statutes are set forth verbatim in the Appendix.

STATEMENT OF THE CASE

Plaintiff *in pro per* Monica Greene filed a Federal Tort Claims Action for wrongful death arising from David Grant United States Air Force Medical Center physicians' (Doctors Timothy Sorrells and Cleveland Waterman) failure to diagnose Monica Greene's mother's ovarian cancer. The complaint was served upon the "United States Government" but named "David Grant United States Air Force Medical Center, Dr. C. S. Waterman, Dr. Timothy Sorrells and Does 1-100." David Grant United States Air Force Medical Center is located at Travis, California, within the Eastern District of California, thus conferring venue and jurisdiction upon the United States District Court for the Eastern District of California.

The complaint was timely filed April 10, 1989, within six months following rejection of Monica Greene's timely filed Form 95 claim form. Service of the complaint was attempted against the governmental defendant on June 20, 1989. Service was effected upon the United States on July 27, 1989. According to the proof of service and the summons, service upon the United States was accepted for the United States by United States Attorney, David Levy within 120 days of the complaint's filing.

Defendant responded with a motion to dismiss on the basis that the governmental defendant was improperly named in the complaint. As Central District attorneys, Plaintiff's counsel expected to be able to re-name Does, so plaintiff attempted designating Doe 1 as "The United States" and also attempted to amend the complaint to correctly describe the United States. Plaintiff then opposed the governmental defendant's motion to dismiss, arguing that the FTCA claim itself, as well as the service upon the same attorneys that represent the United States and United States Air Force, the language in the complaint clearly showing the United States Government was intended as a party, that the United States was actually served with the complaint, etc., were sufficient notice and therefore rejection under these conditions was a hypertechnicality inconsistent with Rule 4, especially with an *in pro per* plaintiff. Notwithstanding, the District Court's March 16, 1990 order on Defendant's Motion to Dismiss held that absent actual notice to Defendant United States within the jurisdictional limitation period for filing the complaint, there could be no relation back under *Fed.R.Civ.P. 15(c)*. The District Court therefore granted Defendant's Motion to Dismiss.

The issue of having named the United States as a "Doe" was not specifically addressed by that order.

Plaintiff Monica Greene filed her notice of appeal on June 13, 1990. The Court of Appeals for the Ninth Circuit affirmed the Eastern District's dismissal of the entire action on April 23, 1991. Plaintiff/Appellant Greene's Motion for Reconsideration was denied May 31, 1991. Petitioner Greene requested an extension of time to file her Petition for Writ of Certiorari and received from this Court an extension until September 28, 1991.

ARGUMENT

I. Plaintiff Greene initially served the United States with a summons describing the intended defendant as "United States Government", therefore her complaint's caption describing the governmental defendant as "David Grant United States Air Force Medical Center" should be considered a mere misnomer; since her subsequent amendment correcting that misdescription was not "changing the party," FRCP Rule 15(c)'s requirement of notice prior to expiration of the time for "commencing the action" does not apply, so her amendment of the misdescription should have been allowed and this Petition for Writ of Certiorari should be granted.

A. The United States Court of Appeals for the Ninth Circuit has decided a question that conflicts with applicable decisions of this Court.

One of the questions before the United States Court of Appeals for the Ninth Circuit was whether Plaintiff Monica Greene should have been permitted to amend her complaint to correctly describe "The United States." The United States has been served with a summons designating the defendant as "United States Government", but the complaint itself described the governmental defendant as "David Grant United States Air Force Medical Center." Erroneously relying upon this Court's opinion in *Schiavone vs. Fortune*, 477 U.S. 21, 106 S.Ct. 2379 (1986), the Ninth Circuit Court of Appeals decided the question against Plaintiff Greene in a way that actually conflicts with *Schiavone*, FRCP Rule 15(c) and the other related rulings.

In *Schiavone*, the plaintiffs named "Fortune" (instead of "Time, Incorporated") as the sole defendant. They attempted to serve upon Time's agent a summons and complaint naming "Fortune" as the defendant, but Time's agent refused to accept service because Time was not named as a defendant. Thereafter, the *Schiavone* plaintiffs amended their complaint to name "Time, Incorporated." Their complaint was dismissed, and this Court affirmed the dismissal, because this Court's reading of the second sentence of FRCP 15(c) imposed a requirement that an amendment "changing the party against whom a claim is asserted" must have been preceded by notice before the statute of limitations has run. *Schiavone, supra*, at 477 U.S. 31, 106 S.Ct. 2385.

The phrase "changing the party against whom a claim is asserted" appears in FRCP 15(c)'s second sentence, which recites the four requirements for relation back only apply to an for relation back of such an amendment, including notice prior to expiration of the time for commencing the action. These four requirements for relation back only, apply to an amendment *"changing* the party." If the party is not being changed, then the four requirements for relation back are not needed; the amendment may be made as a matter of course pursuant to Rule 15(c)'s *first* sentence: "Whenever the complaint or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of original pleading."

This result is endorsed and analyzed by the Wright and Miller treatise as follows:

> [T]here are two situations in which changes may be made to the parties' names as they appear in the complaint, but in which the second sentence of Rule 15(c) should not be implicated. This would be true if the proposed amendment merely corrects a misnomer or changes the capacity in which a defendant is sued.
>
> A misnomer is involved when the correct party was served so that the party before the court is the one plaintiff intended to sue, but the name or description of the party in the complaint is deficient in some respect. Under those circumstances, an amendment merely correcting that description does not entail an actual "changing" of the parties and it should be allowed as a matter of course as long as it satisfies the standard in the first sentence of Rule 15(c).
>
> For example, in *Brittian v. Velk Gallant Company*, 301 F.Supp. 478 (D.C. Ga. 1969), a civil action for damages under the 1964 Civil Rights Act, plaintiff's original complaint omitted the word "Suburban" from defendant's corporate name. According to the court: 'The determinative

> factor...is that the complaint was served upon the proper party....'
>
> The distinction between a misnomer and changing a party is an important one because cases that involve the latter are controlled by the Supreme Court's interpretation of the second sentence of Rule 15(c) in *Schiavone v. Fortune* requiring notice before the statute of limitations has run. If a misnomer is involved, that sentence should not control, and an amendment correcting the problem may be allowed when the action was timely filed but service was after the limitations has run but within the time allotted for service of process. Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d (1990) Section 1498, pp. 130-134.

Plaintiff Greene served her complaint upon the United States (see proof of service attached hereto as Exhibit A). Her summons designated that "United States Government" was being summoned to this civil action (see summons attached hereto as Exhibit B). Service upon the United States was accepted by U.S. Attorney David Levy's office at 650 Capitol Mall, Sacramento, California. Defendants have conceded that service upon the United States was effected on 7/27/89, within the 120-day period for serving.

After receiving the United States' September 18, 1989 motion to dismiss by the "Federal Defendant," Plaintiff Greene sought to amend her complaint to correctly describe the "Federal Defendant" as "The United States." The United States had already been summoned to the action and was already a party. Hence, Plaintiff Greene's amendment to the complaint was not "changing the party," but a correction of a misnomer.

Cases that involve a misnomer are not controlled by the Supreme Court's interpre-tation of the second sentence of Rule 15(c), but rather the first sentence. Plaintiff Greene's amendment correcting the problem should have been allowed. Hence, in the face of the Ninth Circuit's ruling in this action, Plaintiff's Petition for Writ of Certiorari should be granted.

B. The Ninth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other United States Courts of Appeals.

The Second, Third and Seventh Circuit Courts of Appeals have rendered post-*Schiavone* decisions inconsistent with the Ninth Circuit's ruling in the instant matter.

In *Datskow v. Teledyne, Inc. Continental Products Division*, 899 F.2d 1298 (2nd Cir. 1990), the court characterized the plaintiff's failure to properly identify the defendant as "mislabelling." Therefore, although the defendant was not severed until *after* the statute of limitations had expired, the plaintiff's amendment to correctly describe the defendant was permitted. The plaintiffs were not "bringing in a new part," hence the *Schiavone* court's restricted reading of the second sentence of Rule 15(c) did not bar the amendment. See *Datskow, supra*, at 899 F.2d at 102.

Dandrea v. Malsbary Mfg. Co., 839 F.2d 163 (3rd Cir. 1988) reached a similar result. Defendant Malsbary was served approximately two months after the statute of limitations had run. Defendant Malsbary filed a motion to dismiss because it had changed its name to "Koppenhafer Corporation." Dandrea sought to amend her complaint to include Malsbary's new name. See 839 F.2d at 165. The district court held that per *Schiavone v. Fortune*, the amendment was barred under Rule 15(c) because the defendant corporation did not receive notice until after the statute of limitations had run.

The Second Circuit Court of Appeals reversed the district court's dismissal. In arriving at their conclusion, the Second Circuit Court stated:

> The essence of the dispute here is whether Dandrea, by amending her complaint, would be "changing the party" against whom her claim is asserted. If she would be, the conditions enumerated in the second sentence of Rule 15(c) must be met in order for the amendment to relate back. On the other hand if Dandrea by amending her complaint would not be changing a party under the rule, and if the claim made in her proposed amended complaint arose out of the conduct, transaction or occurrence set for original pleading,

> then under the first sentence of Rule 15(c) the amendment would relate back to the date of the original pleading...."

Dandrea, supra, 839 F.2d at 166.

The Second Circuit went on to hold that Dandrea "seeks to amend the complaint not for the purpose of changing, substituting or adding a party, but solely for the purpose of including the same party's correct name. We decline to extend *Schiavone's* holding to preclude Dandrea's amendment." *Dandrea* at 839 F.2d at 168. Thus, again, another United States Court of Appeals rendered a decision in conflict with the Ninth Circuit in the instant matter.

In *Peterson v. Sealed Air Corporation,* 902 F.2d 1232 (7th Cir. 1990), Plaintiff Peterson served his complaint, naming the defendant as "Instapak Corporation," upon the agent for service of process of the proper defendant, Sealed Air Corporation. The defendant argued that it did not receive notice until after the statute of limitations had run, hence any amendments to revise its description from "Instapak" (one of Sealed Air's trademarks) to "Sealed Air Corporation" was barred by Rule 15(c). The *Peterson* court stated:

> In the end, our case does not differ from a misnomer -- a complaint naming, say "Sealed Air Incorporated" served on the last day of the limitations period. Plaintiff could swap "Corporation" for "Incorporated" without hindrance from the rules. *Dandrea v. Malsbary Mfg. Co.*, 839 F.2d 163 (3rd Cir. 1988). Wright, Miller & Kane, *Federal Practice and Procedure* Section 1498 at 134-36.

Peterson, supra, 902 F.2d at 1237.

Although the *Peterson* court ruled that Sealed Air was actually given notice within the limitations period, it went on to conclude:

> [W]e bypass (as the Supreme Court did in *Schiavone,* 477 U.S. at 28-29, 106 S.Ct. at 2383-84) the question whether Rule 15(c) authorizes relation back, despite the absence of timely notice,

> when the original defendant is identical in interest to the proper one."

Peterson, supra, 902 F.2d at 1237. This conclusion is in direct conflict with the Ninth Circuit's ruling in the instant matter.

Also of interest is the *Peterson* court's apparent approving reference to The Advisory Committee on Civil Rules' proposed amendment to Rule 15(c) that extends the time for notice to the maximum allowed by Rule 4(j) for service. *Peterson, supra*, 902 F.2d at 1235.

With three other United States Courts of Appeals having rendered decisions in conflict with the Ninth Circuit's opinion in the instant matter, Plaintiff Greene respectfully requests that her petition for writ of certiorari be granted.

II. In light of subsequent criticism and injustices which Rule 15(c) was designed to avoid, this Court should review its *Schiavone v. Fortune* opinion to construe Federal Rule of Civil Procedure 15(c)'s phrase, "within the period provided by law for commencing the action," to include the time allowed under Rule 4(j) for service of process.

A. Widespread scholarly criticism calls for modification of *Schiavone*

Post-*Schiavone* lower court decisions involving misnamed government defendants illustrate that the injustice condemned by Professor Byse in *Suing the "Wrong" Defendant In Judicial Review of Federal Administration Actions: Proposals for Reform*, 77 Harv.L.Rev. 40 (1963) still exists, despite the Advisory Committee's 1966 attempt to end such injustices by amending Rule 15(c).

Several recent decisions paralleling the circumstances of the government-defendant cases (which the 1966 amendments were intended to remedy) ended with the same pre-1966 result: *Drayton v. Veterans Administration*, 654 F.Supp. 558 (S.D. N.Y. 1987); *Bell v. Veterans Administration Hospital*, 654 F.Supp. 69 (W.D. La. 1987); *Stewart v. United States Postal Service*, 649 F.Supp. 1531 (S.D. N.Y. 1986); *Johnson v. United States Postal Service*, 113 F.R.D. 73 (D. Colo. 1986). These plaintiffs misnamed the government defendants and were denied relation back when they sought to amend after serving their complaints

beyond the 30-day statute of limitations. *Schiavone* was cited to justify dismissal because the government officials had not received adequate notice per *Schiavone's* reading of Rule 15(c).

Several law review articles have criticized *Schiavone's* aftermath; its rationale; its departure from the liberal pleading guidelines embodied in Rules 1 and 8; its flawed research into the cases upon which it rested its analysis (e.g., *Norton v. International Harvester Co.*, 627 F.2d 18 (7th Cir. 1980) does not stand for the proposition that Rule 15(c) requires notice within the statutory period -- it only represents the proposition that amendment should be denied when the 120-day period for service happens to expire *within* the limitation period; the plaintiff in *Sandridge v. Folsom*, 200 F.Supp. 25 (M.D. Tenn. 1959) probably did *not* serve his complaint within the statute of limitations). The articles criticize *Schiavone's* illogical deference to relation back when its ruling requires a defendant to receive notice prior to the expiration of the statute of limitations, so relation back is unnecessary; its disingenuous rationalization that the arbitrariness of its decision was imposed by the legislature when the Supreme Court itself promulgates, implements and interprets the Federal Rules of Civil Procedure; its "plain" language justification when multiple courts were reading the same "plain" language differently which was why *Schiavone* was granted its petition for writ of certiorari in the first place; and even its failure to abide by the inscription on the walls of the Department of Justice: "[W]hen the government is a party to litigation, substance should trump procedure." These rather widespread scholarly criticisms appear in:

1. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L.Rev. 720 (1988) at 722, 726-732;

2. Epter, *An Un-Fortune-ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 Fla.S.Uni. L.Rev. 715 (1990) at 717, 730-36, 744-47; and

3. Helzick, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.Uni.L.Rev. 131 (1988) at 132-34, 148-53.

Each of these articles calls for a modification of *Schiavone's* interpretation of Rule 15(c)'s notice requirement, either by amending the Rule itself to clearly include Rule 4's

period for service or by exercising this Court's powers to review its own decision and to construe Rule 15(c)'s "period for commencing the action" as including the period for service of process.

The *Schiavone* decision and its progeny conflict with prior Supreme Court rulings on the Federal Rules' view toward facilitating adjudication of cases on their merits instead of on arbitrary technical pleading errors. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103 (1957); *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 230 (1962). Construing Rule 15(c) as including the period for service would bring the court back in line with the goals of Rule 15(c)'s relation back provisions -- to liberalize pleading while protecting the statute of limitations.

B. The Advisory Committee on Civil Rules has already proposed amendments and held hearings on adopting amendments to incorporate Rule 4's period for service into Rule 15(c), which the Supreme Court has reviewed and approved.

In response to the widespread dissatisfaction with *Schiavone's* restrictive reading of Rule 15(c), the Advisory Committee has proposed changes in Rule 15(c) to clearly incorporate Rule 4's period for service. The Supreme Court has reviewed and accepted those proposed amendments and those amendments will go into effect on December 1, 1991. The proposed amendments (published in 127 F.R.D. 237, 310 and West's *Federal Civil Judicial Procedure and Rules as Amended to July 1991*, (1991 Rev. Ed.) pp. 46-49 regarding changes to the name of a party read as follows:

> 15(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> ...
>
> (3) The amendment changes the party or the name of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment...has received such notice of the institution of the action....

The Advisory Committee's notes state that this paragraph of Rule 15(c)(3) "has been revised to change the result in *Schiavone v. Fortune, supra,* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint, may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name...." The Advisory Committee made these changes because "on the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8." The Advisory Committee also cites with approval the law review commentaries critical of *Schiavone* discussed above. The Notes also state that these revisions are "intended to produce results contrary to those reached" in a series of post-*Schiavone* decisions where plaintiffs were dismissed based on *Schiavone's* ruling.

At some point, *Schiavone*, itself, should be modified. The string of subsequent injustices flowing from its unnecessarily restrictive reading of Rule 15(c); its internal inconsistencies and conflicts with the underlying purpose of Rule 15(c), relation back, prior Supreme Court rulings on liberal pleading rules and the Federal Rules' fundamental intent to facilitate resolution of cases on the merits where "substance trumps procedure;" and the clamor of continuing scholarly criticism will sooner or later lead to *Schiavone's* revision. There is little point in compounding the injustice here when the changes recommended by the Advisory Committee have already been approved by the Supreme Court.

Petitioner Greene served The United States within the period for service of her complaint. Her amendment to correct the misdescription of the federal defendant in her caption should have related back. Petitioner Greene respectfully requests that this Court take this opportunity to remedy the wrongs flowing from *Schiavone* and grant her Petition for Writ of Certiorari. It is time for *Schiavone* to be overturned.

III. Plaintiff should have been granted relief under Rule 60(b) in that any alleged errors were the result of reasonable mistake, inadvertence or excusable neglect.

Plaintiff Greene further requested that relief be granted pursuant to Rule 60(b). The errors by an *in pro per* plaintiff were clearly the result of mistake, inadvertence or excusable neglect, despite her reasonable diligence in presenting viable claims on

behalf of herself and her family. Initially an *in pro per* plaintiff from out of state, she deserves the benefit of the doubt under Rule 60(b)(1). Courts have been more inclined to grant relief for mistake of law where the mistake is by a lay person. See, e.g., *Potter v. McCall* (9th Cir. 1970) 433 F.2d 1087, 1088) and *Gillespie v. Civiletti* (9th Cir. 1980) 629 F.2d 637.

To the degree her attorneys later may have erred by relying on the ability to rename Does, relief can and should be granted in the interests of justice on the basis of reasonable mistake of law. Plaintiff's counsel was not a member of the Eastern District Bar, but rather the Central District, at the time of filing the complaint. The Central District explicitly permits naming of Does in federal question cases, paralleling the pleading and service guidelines of California state rules. See, e.g., *A. F. Dormeyer Co. v. M.J. Sales & Dist. Co.*, 461 F.2d 40 (CA 7th, 1972) (attorney's lack of acquaintance with the rules in the forum's court; relief under 60(b) granted); *Hibernia Nat. Bank v. Administracion Cent. Soc. Anonima*, 776 F.2d 1277 (5th Cir. 1985).

Consequently, there were ample grounds for granting relief under Rule 60(b)(1) and failing to do so was an abuse of discretion by the courts below. Plaintiff's FTCA claim form was timely filed. Her complaint was filed within the statute of limitations. The United States, itself, was served with her complaint within the time allotted for service. Defendant will not be prejudiced by such a ruling--the same procedure for investigating and defending this action has been followed that would ordinarily have taken place.

IV. Conclusion

There are a number of remedial avenues open to the court at this juncture. The conflicts between the Ninth, Second, Third and Seventh Circuit opinions can be resolved by addressing the "misnomer/mislabelling" theories, exclusively, without specifically overruling *Schiavone*. Wright and Miller's treatise clearly sees "misnomer" of the proper defendant that has been served as a viable exception to *Schiavone*.

The Court could circumvent the issue of relation back by ruling that under the narrow circumstances of an *in pro per* plaintiff who served the proper defendant, and the fact that her

attorneys were unfamiliar with amendment in the absence of availability of Does, Rule 60(b) relief should have been granted.

Either of these rulings resolve Plaintiff Greene's dilemma. However, the better alternative would be to address the injustices flowing from *Schiavone* and decide to bring them to a halt. The *Schiavone* opinion disserves and undermines the Federal Rules of Civil Procedure and rules of pleading in particular.

Under any or all of the foregoing grounds, Petitioner Greene respectfully requests that her Petition for Writ of Certiorari be granted.

DATED: September 26, 1991.

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APPENDIX

Exhibits	1
Orders	4
Supreme Court Extension	19
Statutes	20

PROOF OF SERVICE Hearing:

U.S. District Court
Case No. CIVS-890510 LKK--EM

Plaintiff: Greene
Defendant: Grant, et al.

1. I was over 18 years old and not a party to this action when I served:

SUMMONS AND COMPLAINT: ORDER SETTING STATUS CONFERENCE

2. Party served: U.S. GOVERNMENT BY DAVID F. LEWIS, U.S. ATTORNEY

Address: 650 Capital Mall
(Business) Sacramento, CA 95814

3. I served the party named in item 2 by personally delivering copies:

on: 07/27/89
at: 03:10pm

Declarant:
Debra Neison
Buter, Michael,
Attorney Service
P.O. Box 15050
Los Angeles, CA 90015
213-747-3322
ref #10623-1

Fee for service: $____
Reg'd Ca Process Server
Registration No. 87-020
County:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 11/17/89 Signature: Debra Neisen

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SUMMONS IN A CIVIL ACTION

MONICA GREENE, etc., NO. CIV. S-89-510 LKK

Plaintiffs,

vs.

DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al.,

Defendants.

TO:

UNITED STATES GOVERNMENT
by and through its agent for service,
Peter A. Nowinski, Esq.
United States Attorney for the Eastern District of California
3305 Federal Building
650 Capital Mall
Sacramento, CA 95814

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY

MONICA GREENE, in propria persona
625 Briar Hill, #3
Addison, IL 60101
Telephone: 312/543-5505

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to od so, judgment by default will be taken against you for the relief demanded in the complaint.

EXHIBIT B

APR 1, 1989
DATE

J.R. GRINDSTAFF
CLERK

D. KLOUSNER
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONICA GREENE, etc., NO. CIV. S-89-510 LKK

Plaintiffs,

vs. ORDER

DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al.,

Defendants.

This matter is before the court on defendants' motion to dismiss. The court had previously deferred ruling on the motion in order to allow plaintiff time to conduct discovery on the issue of whether the United States received actual notice within the applicable statute of limitations. The result of that discovery has revealed no indication that either the United States Attorney General or the United States Attorney's Office received any communication relative to the filing of plaintiff's complaint before April 15, 1989.

The Ninth Circuit has held that relation back under Fed.R.Civ.P. 15(c) does not apply unless the United States received actual notice during the jurisdictional limitation period provided in 28 U.S.C. Section 2401(b). *See Allen v. Veterans Administration*, 749 F.2d 1386 (9th Cir. 1984). Since the administrative claim was denied on October 14, 1988, plaintiff had until April 14, 1989, to give actual notice to the United States. *See* 28 U.S.C. Section 2401(b). Plaintiff filed her complaint on April 10, 1989. Unfortunately for plaintiff, actual notice of the suit was not timely served upon the United States. Thus, the complaint must be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

In accordance with the above, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

DATED: March 16, 1990.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
Mar. 16, 1990
Clerk, US District Court
Eastern District of California

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONICA GREENE, Plaintiffs, vs. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al. Defendants.	CASE NUMBER: Civ-S-89-510 LKK **JUDGMENT IN A CIVIL CASE**

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED ACTION DISMISSED.

THAT JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER FILED 3-16-90.

Jesse Casaus
Clerk, Acting

E. Marton
Deputy Clerk

ENTERED 3-16-90

Clerk, U.S. District Court
Eastern District of California
By E. Marton, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONICA GREENE, an individual, individually and as Personal Representative of the Estate of Sylvia S. Greene, Plaintiffs, vs. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al., Defendants.	NO. CIV. S-89-510 LKK ORDER

This matter is before the court on defendants Waterman and Sorrells' motions to dismiss. The court has reviewed the briefs and evidence on file and disputes of the matter herein, without argument. *See* Local Rule 230(h).

Although plaintiff filed this action in pro per, Michael Baum was substituted in as counsel of record by order dated September 5, 1989. Affidavits of Monica Greene and Howard Greene have been filed which recount the efforts taken to locate the defendants within the 120-day period provided by Fed. R. Civ. P. 4(j). There is no evidence in the record before the court that any action was taken by counsel to locate the addresses of defendants Waterman and Sorrells until December 12, 1989, when plaintiff propounded interrogatories to the governmental defendant requesting the addresses of the individual defendants. This action was taken 98 days after Michael Baum became attorney of record. Thereafter, defendant Waterman was served on February 9, 1990, and defendant Sorrells on February 15, 1990. Counting from the time Michael Baum became attorney of record, the number of days elapsed until service of process was 157 for Waterman and 163 for Sorrells. Even if just cause existed for the failure of the pro per plaintiff to serve within the 120-day time period imposed by Fed. R. Civ. P. 4(j), the lack of

diligence on the part of plaintiff's counsel once he became attorney of record appears to be unexcusable.

The order granting plaintiff an additional 120 days from December 4, 1989 was expressly made without prejudice to a motion brought pursuant to Fed. R. Civ. P. 4(j). Plaintiff has failed to show good cause. *See Wei v. Hawaii*, 763 F.2d 370 (9th Cir. 1985).

Accordingly, defendants' motions to dismiss are **GRANTED.**

IT IS SO ORDERED.

DATED: April 20, 1990.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

Filed
Apr. 23, 1990
Clerk, U.S. District Court
Eastern District of California

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONICA GREENE, Plaintiffs, vs. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al. Defendants.	CASE NUMBER: Civ-S-89-510 LKK **JUDGMENT IN A CIVIL CASE**

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED ACTION DISMISSED.

THAT JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER FILED 4-23-90.

Jesse Casaus
Clerk, Acting

E. Marton
Deputy Clerk

ENTERED 4-23-90
Clerk, U.S. District Court
Eastern District of California
By E. Marton, Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MONICA GREENE, an individual, individually and as Personal Representative of the Estate of Sylvia S. Greene, Plaintiffs, vs. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER, et al., Defendants.	NO. CIV. S-89-510 LKK ORDER

This matter is before the court on plaintiff's motion to reconsider. The court has reviewed the briefs and evidence on file and disposes of the matter herein, without argument. *See* Local Rule 230(h).

On April 23, 1990, this court granted defendants Waterman's and Sorrells' motion to dismiss pursuant to Fed. R. Civ. P. 4(j). Plaintiff now moves this court to reconsider based on newly submitted evidence regarding counsel's efforts to locate the defendants. Because defendants focused on the 120-day period following the filing of the complaint, it was reasonable at the time for counsel to not submit this new evidence in opposition. Thus, pursuant to Local Rule 230(k)(3), the motion for reconsideration is appropriately brought.

The burden is on plaintiff to establish good cause for failure to serve within 120 days. *See United States v. Kenner Gen. Contractors, Inc.*, 764 F.2d 707 (9th Cir. 1985). The evidence submitted by plaintiff in support of the motion to reconsider shows that plaintiff's counsel wrote one letter to the American Medical Association and ran a social security number check on Dr. Waterman. By mid-November, plaintiff's counsel knew that

these minimal attempts would not yield Dr. Waterman's address. The failure to ask the governmental defendant for the information in September, which would have revealed the information within 30 days, is unexplained. In addition, since plaintiff believed Dr. Waterman was practicing in Louisiana, counsel's failure to consult the Louisiana Board of Medical Examiners appears to be inexplicable. Finally, counsel's vague references to unsubstantiated phone calls regarding the whereabouts of defendants Sorrells and Waterman is insufficient to establish good cause.

After reviewing the evidence submitted in opposition to the motion to dismiss and the newly submitted evidence in support of the motion to reconsider, I find that plaintiff has failed to establish good cause for failure to serve within 120 days. Accordingly, the motion to reconsider is **DENIED.**

IT IS SO ORDERED.

DATED: June 1, 1990.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
June 1, 1990
Clerk, U.S. District Court
Eastern District of California

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

MONICA GREENE, an individual and as Personal Representative of the Estate of Sylvia S. Greene, Plaintiff-Appellant, vs. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER; TIMOTHY SORRELLS, et al., Defendants-Appellees.	No. 90-15917 D.C. No. CV-89-0510-LKK ORDER

Before: D. W. NELSON, KOZINSKI and T. G. NELSON, Circuit Judges.

Appellant's petition for rehearing is denied.

Filed
May 31, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONICA GREENE, an individual and as Personal Representative of the Estate of Sylvia S. Greene	)	No. 90-15917
	)	D.C. No. CV-89-0510-LKK
Plaintiff-Appellant	)	
v.	)	
DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER; TIMOTHY SORRELLS, et al.	)	
Defendants-Appellees	)	

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 04/23/91.

FILED
June 11, 1991
Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

MONICA GREENE, an individual and as Personal Representative of the Estate of Sylvia S. Greene, Plaintiff-Appellant, v. DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER; TIMOTHY SORRELLS, et al., Defendant-Appellees.	No. 90-15917 D.C. No. CV-89-0510-LKK

MEMORANDUM*

Appeal from the United States
District Court for the
Eastern District of California
Lawrence K. Karlton, District Judge,
Presiding

Submitted March 15, 1991**
Palo Alto, California

Before: D. W. NELSON, KOZINSKI and T. G. NELSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the course of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

FACTUAL AND PROCEDURAL BACKGROUND

Sylvia Greene sought medical attention from personnel at the David Grant United States Air Force Medical Center. She died approximately two years later from cancer. Appellant Monica Greene (Greene), one of Sylvia's children, claims Sylvia's death resulted from the failure of the personnel at the Air Force facility to properly diagnose the cancerous condition at an earlier date.

Greene filed an administrative claim with the Department of the Air Force which was denied in a letter dated October 14, 1988. Greene filed this action under the Federal Tort Claims Act (FTCA) on April 10, 1989, within the six month period for filing of the claim.

The complaint named as defendants, David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C. S. Waterman, and Does 1-100. The United States Attorney received actual notice of the commencement of the action on June 21, 1989. No notice was given prior to that time to the United States or any of its representatives. Dr. Waterman was served on February 9, 1990, and Dr. Sorrells was served on February 15, 1990.

The district court granted the United States' motion to dismiss for lack of subject matter jurisdiction. The district court dismissed the action as to the individual defendants for failure to accomplish service within the 120 day period provided by FED. R. CIV. P. 4(j). In dismissing the action, the court noted that Greene filed the action *in pro per* and counsel Michael Baum was substituted as counsel of record on September 15, 1989. Greene appeals the order dismissing the complaint for lack of subject matter jurisdiction and from the order dismissing for failure to accomplish service. Greene also appeals from the order denying her motion for reconsideration.

We review an order to dismiss under Federal Rule of Civil Procedure 12(b)(1) *de novo*. *Druso v. Intl'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 3217 (1990). We examine the trial court's ruling on a motion for reconsideration for abuse of discretion. *Frederick S. Wyle Processional Corp. v. Texaco, Inc.* 764 F.2d 604, 608 (9th Cir. 1985).

DISCUSSION

I. Focus of the Complaint.

Greene correctly contends that the case of *Schiavone v. Fortune*, 477 U.S. 21 (1986), stands for the proposition that the court must look at the focus of the pleading to determine who the actual defendant was in the case. Greene argues that the complaint was in fact directed at the United States even though the caption was incorrect. Unfortunately, the complaint does not support Greene's contention.

The caption names "David Grant United States Air Force Medical Center." paragraph 3 of the complaint states: "At all times herein mentioned defendant DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER Hereinafter referred to as the "CENTER"), by and through the United States Air Force, a federal agency of the United States,..." The individual defendants were each described as "a physician employed by the United States Air Force at the CENTER." In paragraph 7, the complaint stated: "Jurisdiction is conferred upon this court pursuant to a tort claims action for wrongful death being brought against an agency and employees of the United States government, based on negligent medical treatment at the CENTER." In paragraph 10, the statement is made: "At all times herein mentioned, defendants, and each of them, were the agents and employees of each of the remaining defendants,..."

The complaint can only be fairly read as being directed to an agency of the United States and not to the United States itself. Therefore, the focus of the pleading clearly indicates that the complaint was directed at an agency of the United States, and two employees of that agency. *Schiavone v. Fortune*, 477 U.S. 21 (1986). The United States itself was not a named defendant.

II. Relation Back.

Greene contends that her amended complaint, filed November 20, 1989, specifically naming the United States as the party defendant should relate back to the filing of the original

complaint for purposes of the statute of limitations.[1] The case of *Allen v. Veterans Administration*, 749 F.2d 1386 (9th Cir. 1984), controls here. Allen had sued the Veterans Administration instead of naming the United States. In that case, the United States Attorney's Office did not receive actual notice of the action until several days after the six month statute of limitations had run. (*See*, 28 U.S.C. Section 2401(b).) In affirming the district court's denial of a motion to amend to name the United States and have the amendment relate back, the *Allen* court said: "Only if the United States Attorney and the Attorney General receive notice of the suit prior to the running of the statute of limitations will a plaintiff be allowed to substitute the United States as a defendant under Rule 15(c)." 749 F.2d at 1390. *See, also McGuckin v. U.S.*, 918 F.2d 811, 813 (9th Cir. 1990). The same principle applies in this circumstance. The district court was correct in dismissing the complaint as to the defendant United States.

III. Rule 60(b).

Greene also contends that the court abused its discretion in not granting her relief under Rule 60(b), contending that her errors were the result of reasonable mistake, inadvertence, or excusable neglect. The *Allen* case likewise disposes of this contention. Under very similar facts, this court said:

> Finally, the district court did not abuse its discretion in denying relief from judgment under Rule 60(b), as mistake, inadvertence, or excusable neglect does not include failure to sue the proper defendant within the period prescribed by the statute of limitations.

749 F.2d at 1390.

IV. Dismissal of Individual Defendants.

Greene argues the district court erred in dismissing her claim against the defendant doctors for failure to effect a timely

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[1] Greene was entitled to amend her pleading "as a matter of course," since no responsive pleading was filed. FED. R. CIV. P. 15(a); *Allen v. Veterans Administration*, 749 F.2d 1386, 1388-89 (9th Cir. 1984).

service. We need not review the district court's decision in this regard since, under the FTCA, Sorrells and Waterman are not proper defendants. *Morris v. U.S.*, 521 F.2d 872 (9th Cir. 1975). We affirm the district court's judgment on any ground finding support in the record. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 3217 (1990).

We conclude the district court properly dismissed Greene's complaint. We further conclude the district court did not abuse its discretion in denying the motion to reconsider. The orders of the district court are AFFIRMED.

Filed
Apr 23 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

SUPREME COURT OF THE UNITED STATES

No. A-159

Monica Greene, individually and as
Personal Representative of the
Estate of Sylvia S. Greene,

Petitioner,

v.

David Grant United States
Air Force Medical Center, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 28, 1991.

Sandra D. O'Connor
Associate Justice of the
Supreme Court of the United States

Dated this 3rd day of September, 1991.

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or admiralty, with the exceptions stated in Rule 81. they shall be construed to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. Jul 1, 1966.)

RULE 4. PROCESS

(a) **Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) **Summons: Form.** The Summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) **Service.**

(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshall or deputy United States marshal, or by a person specially appointed for that purpose.

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshall or deputy United States marshall, or by a person specially appointed by the court for that purpose, only --

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. Section 1915, or of a seaman authorized to proceed under Title 28, U.S.C. Section 1916,

(ii) on behalf of the United States or an officer of agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule --

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and that statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint

by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of the court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-

claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in the event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make an affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is designated by order of the

district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) **Return.** Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L. 97-462, 2, Jan. 12, 1983, 96 Stat. 2527; Mar. 2, 1987, eff. Aug. 1, 1987.)

RULE 8. GENERAL RULES OF PLEADING

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a

pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and such deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effects of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or

defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleading. All pleadings shall be so construed as to do substantial justice. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(c) Relation Back of Amendments. [Effective until Dec. 1, 1991. See also, subd. (c) below.] Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(c) Relation Back of Amendments. [Effective on Dec. 1, 1991. See, also, subd. (c) above.] An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (a) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (a) and (b) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the actions as a defendant.

Notes of Advisory Committee on Rules

1991 Amendment

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally, the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. *E.g., Board of Regents v. Tomanio*, 446 U.S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. *E.g., West v. Conrail, Inc.*, 107 S.Ct. 1538 (1987). *Cf. Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987); *Stewart Organization v. Ricoh, 108 S.Ct. 2239 (1988)*. Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it

should be available to save the claim. Accord, *Marshall v. Mulrenin, 508 F.2d 39 (1st cir. 1974).* If *Schiavone v. Fortune, 106 S.Ct. 2379 (1986)* implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra,* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendants's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 NOTRE DAME L.REV. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again,* 61 S.CAL.L.REV. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 86 MICH.L.REV. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in *Gardner v. Gartman,* 880 F.2d 797 (4th cir. 1989), *Rys v. U.S. Postal Service,* 886 F.2d 443 (1st cir. 1989); *Martin's Food & Liquor, Inc. v. U.S. Dept. of Agriculture,* 14 F.R.S.3d 86 (N.D. Ill. 1988). *But cf. Montgomery v. United States Postal Service,* 867 F.2d 900 (5th cir. 1989), *Warren v. Department of the Army,* 867 F.2d 1156 (8th cir. 1989); *Miles v. Department of the Army,* 881 F.2d 777 (9th cir. 1989), *Barsten v. Department of the Interior,* 896 F.2d 422 (9th cir.

1990); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018 (11th cir. 1989).

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistakes, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated,. or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action or to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 98, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1949; Dec. 29, 1948, eff. Oct. 20, 1949, Mar. 2, 1987, eff. Aug. 1, 1987.)

Local Rules U.S. District Court, Central District of California

3.7.2.1 Diversity of Citizenship. In any civil action originally commenced in this Court, where jurisdiction is alleged to be based on diversity of citizenship, the Clerk shall refuse to accept for filing any comlaint or petition that includes any party designated as a Doe or a wholly fictitious name, unless accompanied by a

dismissal of the fictitiously named parties or otherwise ordered by the Court in a particular case.

3.7.2.2 Federal Question Jurisdiction. The provisions of Local Rule 3.7.2.1 shall not apply when the complaint or petition alleges that a statute of the United States gives this Court subject matter jurisdiction without regard to the citizenship of the parties.

No. 91-581

In the Supreme Court of the United States

OCTOBER TERM, 1991

MONICA GREENE, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF SYLVIA S. GREENE, PETITIONER

v.

DAVID GRANT UNITED STATES AIR FORCE
MEDICAL CENTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In this action under the Federal Tort Claims Act, petitioner named a federal military hospital, rather than the United States, as a defendant; failed to serve the complaint on the government until after the FTCA's statute of limitations had expired; and then sought to amend the complaint to substitute the United States as a defendant. The question presented is whether the action may now be pursued against the United States on the theory that the amendment merely corrected a misnomer in the original complaint or related back, pursuant to Fed. R. Civ. P. 15(c), to the date the original complaint was filed.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Allen v. *Veterans Administration*, 749 F.2d 1386 (9th Cir. 1984)	3, 5, 9
Dandrea v. *Matsbary Mfg. Co.*, 839 F.2d 163 (3d Cir. 1988)	5-6
Datskow v. *Teledyne, Inc. Continental Products Div.*, 899 F.2d 1298 (2d Cir.), cert. denied, 111 S. Ct. 149 (1990)	5
Holmes v. *Eddy*, 341 F.2d 477 (4th Cir.), cert. denied, 382 U.S. 892 (1965)	5
Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990)	8
Morano v. *United States Naval Hospital*, 437 F.2d 1009 (3d Cir. 1971)	5
Myers & Myers, Inc. v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975)	5
Peterson v. *Sealed Air Corp.*, 902 F.2d 1232 (7th Cir. 1990)	6
Schiavone v. *Fortune*, 477 U.S. 21 (1986)	6-7
Stewart v. *United States*, 655 F.2d 741 (7th Cir. 1981)	5
Toth v. *Trans World Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988)	8

Statute and rules:

Federal Tort Claims Act:	
28 U.S.C. 2401(b)	2, 3

Statute and rules—Continued: Page

28 U.S.C. 2675(a) 2
28 U.S.C. 2679(a) 5
Fed. R. Civ. P.:
Rule 4(j) 7
Rule 10(a) 5
Rule 15(c) 3, 6, 7, 8
Rule 60(b) 3, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-18) is not reported, but the judgment is noted at 931 F.2d 59 (Table). The orders of the district court (Pet. App. 4-5, 7-8, 10-11) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. A petition for rehearing was denied on May 31, 1991 (Pet. App. 12). On September 3, 1991,

Justice O'Connor granted an extension of time within which to file a petition for a writ of certiorari to and including September 28, 1991 (Pet. App. 19). The petition was filed on September 30, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this action under the Federal Tort Claims Act, petitioner alleges that her mother's death was attributable to negligent medical treatment from physicians at the David Grant United States Air Force Medical Center. Petitioner's administrative claim, filed pursuant to 28 U.S.C. 2675(a), was denied on October 14, 1988. Under 28 U.S.C. 2401(b), petitioner had six months from that date (to and including April 14, 1989) to bring an FTCA action against the United States. On April 10, 1989, petitioner filed this action in the district court. The complaint named as defendants "David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C.S. Waterman and Does 1-100." The United States was not named as a defendant. Pet. App. 15; Pet. 3.

The statute of limitations expired on April 14, 1989. No notice of the suit was given to the United States or any of its representatives by that date. The United States Attorney first received actual notice of the action on June 21—more than 60 days after the expiration of the statute of limitations. Petitioner did not serve her complaint on the United States Attorney until July 27, 1989. Pet. App. 1, 15.

The government moved to dismiss for lack of subject matter jurisdiction. On November 20, 1989, petitioner filed an amended complaint naming the United States as a defendant. After permitting discovery with respect to the question whether the United States had received any notice of the suit on or before

April 14, 1989, the district court dismissed the action. The court held that because the United States did not receive notice of the suit within the period of limitations prescribed by 28 U.S.C. 2401(b), the amendment substituting the United States did not relate back, pursuant to Fed. R. Civ. P. 15(c), to the date the complaint was filed. Pet. App. 4-5, 16-17.

2. The Ninth Circuit affirmed with an unpublished opinion. Pet. App. 14-18. The court first rejected petitioner's contention that the suit was initially brought against the United States—and that the original complaint's identification of the medical center as the non-individual defendant was a misnomer. Relying on allegations of the complaint that referred separately to the medical center, the Air Force, and the United States, the court concluded that "[t]he complaint can only be fairly read as being directed to an agency of the United States and not to the United States itself." *Id.* at 16. The court also held that the amended complaint did not relate back to the filing of the original complaint. "Only if the United States Attorney and the Attorney General receive notice of the suit prior to the running of the statute of limitations," the court explained, "will a plaintiff be allowed to substitute the United States as a defendant under Rule 15(c)." *Id.* at 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d 1386, 1390 (9th Cir. 1984)). Finally, the court of appeals held that petitioner could not obtain relief from the judgment under Fed. R. Civ. P. 60(b), since "mistake, inadvertence, or excusable neglect does not include failure to sue the proper defendant within the period prescribed by the statute of limitations." Pet. App. 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d at 1390).

ARGUMENT

1. Petitioner contends that her action was originally brought against the United States and, accordingly, that the subsequent amendment should be regarded only as correcting a misnomer, rather than adding the United States as a new party. Pet. 5-10.

As the court of appeals recognized, the language of petitioner's original complaint forecloses that contention. The complaint named "David Grant United States Air Force Medical Center, Dr. Timothy Sorrells, Dr. C.S. Waterman and Does 1-100" as the defendants. Pet. App. 15. The remainder of the complaint confirmed that the reference to the medical center was not a misnomer—*i.e.*, a failure to use the correct name for a party from which the complaint actually sought relief. The jurisdictional allegation of the complaint stated that the suit was "brought against an agency and employees of the United States." Pet. App. 16. The complaint also distinguished expressly between the United States, the Air Force, and the medical center, and named only the last entity as the defendant. Petitioner's pleading described the Air Force as an "agency of the United States" and the medical center as the place where the individual defendants were employed and petitioner's mother allegedly received negligent medical treatment. *Ibid.* The Ninth Circuit was entirely justified in concluding that petitioner's "complaint can only be fairly read as being directed to an agency of the United States and not to the United States itself. Therefore, the focus of the pleading clearly indicates that the complaint was directed at an agency of the United States and two employees of that agency. * * * The United States itself was not a named defendant."

Ibid.[1] In any event, the interpretation of the allegations of a particular complaint presents no question calling for this Court's review.

Contrary to petitioner's contention, the fact that the summons was addressed to the "UNITED STATES GOVERNMENT" (Pet. App. 2) does not suggest that the action was actually brought against the United States. The complaint is the document in which a plaintiff identifies the parties from whom relief is sought and the basis for those claims. Cf. Fed. R. Civ. P. 10(a) (caption of the complaint "shall include the names of all the parties"). In any event, the caption of the summons, like the complaint, identified the non-individual party as "DAVID GRANT UNITED STATES AIR FORCE MEDICAL CENTER." A court seeking to ascertain the identity of the parties in an action may not properly elevate the description of the addressee of a summons above the summons' caption and the allegations of the accompanying complaint.

The court of appeals' unpublished decision is not in conflict with decisions of other courts of appeals. See Pet. 10-12. In *Datskow* v. *Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298, 1301-1302 (2d Cir.), cert. denied, 111 S. Ct. 149 (1990), and *Dandrea* v.

[1] An action against a federal agency is not the equivalent of an action against the United States. In fact, 28 U.S.C. 2679(a) recognizes the significance of the distinction, and suits brought against federal agencies or installations *eo nomine*, rather than against the United States, are routinely dismissed. See, *e.g.*, *Allen* v. *Veterans Administration*, 749 F.2d at 1388; *Stewart* v. *United States*, 655 F.2d 741, 742 (7th Cir. 1981); *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252, 1256 (2d Cir. 1975); *Morano* v. *United States Naval Hospital*, 437 F.2d 1009, 1010 (3d Cir. 1971); *Holmes* v. *Eddy*, 341 F.2d 477, 480 (4th Cir.), cert. denied, 382 U.S. 892 (1965).

Malsbary Mfg. Co., 839 F.2d 163, 166-168 (3d Cir. 1988), the courts held that complaints using the wrong name for corporate defendants nevertheless manifested a clear intention to sue those corporations. In this case, by contrast, petitioner's complaint distinguished between the United States and the medical center and asserted claims only against the latter. *Peterson* v. *Sealed Air Corp.*, 902 F.2d 1232, 1236-1237 (7th Cir. 1990), is also inapposite. In that case, the court held that a parent corporation received actual notice of a complaint, which incorrectly named a subsidiary as the defendant, when the complaint was served on the parent's registered agent. Here, no representative of the United States received notice of the action until after the statute of limitations had expired.

2. Because petitioner's original complaint did not name the United States as a defendant, her amendment adding it as a party was governed by the second sentence of Fed. R. Civ. P. 15(c).[2] In *Schiavone* v.

[2] Until December 1, 1991, Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the

Fortune, 477 U.S. 21, 29-32 (1986), this Court held that Fed. R. Civ. P. 15(c) provides for relation back of an amendment substituting a defendant only if that defendant receives notice of the action within the period of limitations. The district court determined, after discovery, that no representative of the United States received notice of petitioner's action within the period of limitations. Consequently, as petitioner acknowledges (Pet. 5, 10-12), *Schiavone* compels the conclusion that her amendment does not relate back under Rule 15(c).

There is no sound reason why the Court should reconsider its decision in *Schiavone*. The decision in that case was based on Rule 15(c)'s plain language, 477 U.S. at 30, and there has been no intervening development casting doubt on the Court's reasoning. In fact, this Court has promulgated an amendment to Rule 15(c), addressing cases like this one, that will become effective, in the absence of congressional action, on December 1, 1991. Under the proposed rule, an amendment to a complaint substituting the United States as the defendant in an action will relate back if service is made on a United States Attorney within the period permitted by Rule 4(j).[3] Unless Congress acts to block the amendment (and that appears unlikely to occur), the correctness of the Court's

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Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

[3] The amendment to Rule 15(c) refers to Rule 4(m). However, the amended rules will contain no Rule 4(m); Rule 4(j) seems clearly to be the rule to which Rule 15(c) was intended to refer.

interpretation of the present version of the rule will have little continuing significance.[4]

3. The court of appeals correctly rejected petitioner's contention that Fed. R. Civ. P. 60(b) authorizes relief from a statute of limitations that, in this instance, is a limit on a waiver of sovereign immunity.[5] In any event, a decision to deny relief under Rule 60(b) is subject to review only for abuse of discretion. See, *e.g.*, *Toth* v. *Trans World Airlines, Inc.*, 862 F.2d 1381, 1387 (9th Cir. 1988). The court of appeals was fully justified in concluding that "the district court did not abuse its discretion in denying relief from judgment under Rule 60(b), as mistake, inadvertence, or excusable neglect does not include

[4] The order promulgating the 1991 amendments provides that they "shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending." 111 S. Ct. CCXIII (1991). It would not be "just and practicable" to apply the amendment to Rule 15(c) so as to resurrect actions that, under the statutes and rules previously in effect, were outside the period of limitations.

[5] The issue of equitable tolling was not raised in the lower courts. Cf. *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). However, this is not a case in which that doctrine could properly be invoked. Here, Rule 15(c) specifies the circumstances under which a defendant not named within the period of limitations may be brought into an action; the doctrine of equitable tolling may not be employed to circumvent those limitations. In any event, the error involved in this case—the failure to name the correct defendant in an FTCA suit—gives rise at best to "a garden variety claim of excusable neglect" that is insufficient to warrant equitable tolling. 111 S. Ct. at 458. This Court made clear in *Irwin* that "[b]ecause the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, * * * no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." *Ibid.*

failure to sue the proper defendant within the period prescribed by the statute of limitations." Pet. App. 17 (quoting *Allen* v. *Veterans Administration*, 749 F.2d at 1390).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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